Lau King Kieng v Axa Affin General Insurance Bhd and another suit

HIGH COURT (MIRI) — SUIT NOS MYY-22–40/11 OF 2011 AND MYY-22–41/11 OF 2011
STEPHEN CHUNG JC
21 JUNE 2013

Insurance — Accident insurance — Cause of injury — Insurance policy holder accidental fall while gardening — Pruning scissors held struck right eye — Sufferance of loss, pain and incapacitation from work and general activities — Claim for insurance — Refusal of insurance company to pay policy holder — Whether injury accident within meaning of insurance policies — Whether insurance company in breach of of terms and conditions of policy

The plaintiff had an accidental fall while gardening at home and the pruning scissors which he was holding had struck his right eye. Due to the unfortunate event, the plaintiff suffered loss, pain and was incapacitated from his work and general activities and had to undergo a surgery. Dr Chieng, who prepared the plaintiff's medical report, testified that the plaintiff sustained a serious injury to the right eye resulting in the loss of the right eye lens, globe perforation and vitreous haemorrhage. The plaintiff submitted that AXA Affin General Insurance Bhd and Pacific Insurance Bhd ('the defendants'), insurance companies of which he had purchased policies from, failed, neglected and refused to pay the plaintiff under the respective insurance policy and was therefore in breach of the terms and conditions of their respective policy. The plaintiff demanded a sum of RM500,000 from AXA Insurance and RM250,000 from Pacific Insurance for the loss sustained as a result of the accident under the respective insurance policy. However, the defendants contended that the injury was not an accident within the meaning of the respective insurance policies. The defendant also contended that the injury was due to the plaintiff's action wilfully and or intentionally inflicting or exposing himself to danger or in a negligent manner while holding a pair of pruning scissors without any safety equipment.

Held:

(1) When the defendants put the plaintiff to strict proof, the onus remained with the plaintiff throughout. The plaintiff must establish on a balance of probabilities that his injury or loss was due to a risk insured by the policy, although it might be foolhardy for the plaintiff to climb the *rambutan* tree while holding the scissors, it could not be classified or deemed to be a reckless or dangerous activity such as winter sports, rock climbing,

mountaineering, parachuting or big game hunting within the meaning of the exclusion 15 clause in the insurance policy (see para 12).

(2) No one sane would deliberately pierce his own eye with the pruning scissors. The injury suffered by the plaintiff was due to an accident which was an insured risk under the respective policy. There was no evidence that he intentionally pricked or pierced his right eye with the scissors. If he did, there was no necessity for him to climb the tree in order to do so. The plaintiff did not intentionally inflict a self-injury nor was he engaging in an unlawful act or in a dangerous or reckless activity. His claims for compensation were not excluded under the respective insurance policies (see paras 13–15).

[Bahasa Malaysia summary

Plaintif mengalami kemalangan semasa berkebun di rumahnya dan gunting pangkas yang dipegangnya telah terkena mata kanannya. Akibat kejadian malang ini, plaintif mengalami kehilangan, kesakitan dan tidak berupaya membuat kerjanya dan aktiviti-aktiviti biasa dan terpaksa menjalani pembedahan. Dr Chieng, yang menyediakan laporan perubatan plaintif, memberi keterangan bahawa plaintif mengalami kecederaan serius kepada mata kanannya mengakibatkan kehilangan kanta mata kanan, 'globe perforation' dan pendarahan 'vitreous'. Plaintif berhujah bahawa AXA Affin General Insurance Bhd dan Pacific Insurance Bhd ('defendan-defendan'), syarikat-syarikat insurans yang mana dia membeli polisi daripada mereka, gagal, cuai dan menolak daripada membayar plaintif di bawah polisi insurans masing-masing dan oleh itu memungkiri terma-terma dan syarat-syarat polisi mereka masing-masing. Plaintif menuntut jumlah sebanyak RM500,000 daripada AXA Insurance dan RM250,000 daripada Pacific Insurance untuk kehilangan yang dialami akibat kemalangan di bawah polisi insurans masing-masing. Walau bagaimanapun, defendan-defendan berhujah bahawa kecederaan bukan kemalangan dalam maksud polisi insurans masing-masing. Defendan juga berhujah bahawa kecederaan adalah akibat tindakan kecuaian atau sengaja plaintif menyebabkan atau mendedahkan dirinya kepada bahaya atau dalam cara cuai semasa memegang gunting pangkas tanpa apa-apa peralatan keselamatan.

Diputuskan:

(1) Apabila defendan-defendan meletakkan plaintif kepada pembuktian ketat, beban kekal dengan plaintif keseluruhannya. Plaintif mesti membuktikan atas imbangan kebarangkalian bahawa kecederaan atau kerugiannya adalah akibat kepada risiko yang diinsuranskan oleh polisi, walaupun ia mungkin sangat berani untuk plaintif memanjat pokok rambutan dengan memegang gunting, ia tidak dapat diklasifikasikan atau dianggap sebagai tidak mempedulikan keselamatan diri atau aktiviti yang sukar dan bahaya seperti musim sejuk, mendaki batu, mendaki

gunung, payung terjun atau pemburuan mergastua besar dalam maksud klausa pengecualian 15 di dalam polisi insurans (lihat perenggan 12).

(2) Tiada orang yang waras akan sengaja menikam matanya sendiri dengan gunting pangkas. Kecederaan yang dialami oleh plaintif adalah akibat daripada kemalangan yang mana adalah risiko yang diinsuranskan di bawah polisi masing-masing. Tidak terdapat bukti bahawa dia dengan sengaja mencucuk atau menikam mata kanannya dengan gunting. Jika dia berbuat demikian, tidak perlu baginya untuk memanjat pokok untuk berbuat sedemikian. Plaintif tidak dengan sengaja menyebabkan kecederaan atau melakukan tindakan salah di sisi undang-undang atau dalam aktiviti bahaya atau sebagai tidak mempedulikan keselamatan diri. Tuntutannya untuk pampasan tidak dikecualikan di bawah polisi insurans masing-masing (lihat perenggan 13–15).]

Notes

For a case on cause of injury, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 4.

Cases referred to

Abu Bakar v Oriental Fire & General Insurance Co Ltd [1974] 1 MLJ 149, FC (refd)

Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd [1992] 1 CLJ 330, HC (refd)

Ford's Hotel Co Ltd v Bartlett [1896] AC 1, HL (refd)

Goh Chooi Leong v Public Life Assurance Co Ltd [1964] 1 MLJ 5 (refd)

IJM Construction Sdn Bhd v Cleveland Development Sdn Bhd [2002] 3 MLJ 516; [2002] 8 CLJ 484, HC (refd)

National Insurance Co Ltd v S Joseph [1973] 2 MLJ 195 (refd)

Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 5 MLJ 625; [2002] 3 CLJ 213, FC (refd)

Winsin Enterprise Sdn Bhd vs Oxford Talent (M) Sdn Bhd [2009] MLJU 286; [2010] 3 CLJ 634, HC (refd)

Legislation referred to

Arbitration Act 2005 s 10

Insurance Act 1996 s 150(1)(a), (b), (2)(a), (b), (c), (d), (3)

Keith Chin (Zaidah bt Yak with him) (Yong Wong & Chin) for the plaintiff.
Satinder Singh Sandhu (Sandhu & Co) for the defendant.

Stephen Chung JC:

[1] The parties agreed that Suit No MYY-22–40/11 of 2011 and Suit No MYY-22–41/11 of 2011 be jointly tried. In Suit No MYY-22–40/11 of 2011,

the plaintiff purchased a personal accident individual insurance under 'SmartCare VIP-Plan 1 (Class 1)' Policy No SAS/01930406/17/06/HKC dated 17 June 2008 from the defendant's Axa Affin General Insurance Bhd. On 11 June 2008, the plaintiff paid the first annual premium to the defendant.

[2] In Suit No MYY-22–41/11 of 2011, the plaintiff purchased a personal accident individual insurance under 'Gold-Cross Super Protector Insurance Policy' Policy No LPN-P0079313-Q2 dated 12 May 2009 from the defendant's Pacific Insurance Bhd. On 12 May 2009 the plaintiff paid the first annual premium to the defendant. In this judgment I shall refer to AXA and Pacific as the defendants.

[3] On 3 June 2009 at about 5pm, the plaintiff pleaded that he had an accidental fall from a tree while gardening at home. He was holding a pair of pruning scissors which struck his right eye during the fall. The plaintiff suffered injury to his right eye lens. The plaintiff was operated and his injured right eye lens was replaced during surgery by eye specialist Dr Chieng Lee Ling @ Lee Ong on 19 April 2010. The plaintiff testified that he suffered loss, pain and was incapacitated from his work and general activities.

[4] The plaintiff testified that the defendants have failed, neglected and refused to pay the plaintiff under the respective insurance policy. The plaintiff submitted that the defendants were in breach of the terms and conditions of their respective policy. By separate letter of demand the plaintiff demanded that AXA Insurance should pay to the plaintiff a sum of RM500,000 and that Pacific Insurance should pay RM250,000 for the loss sustained as a result of the accident under the respective insurance policy. The plaintiff sought a declaration that the plaintiff is entitled to be paid the respective sum of RM500,000 and RM250,000 by the defendants under their respective policy.

[5] The facts showed that after the injury, the plaintiff sought treatment at Miri City Medical Centre but was referred to the emergency department at Miri Hospital. He was scheduled to see the eye specialist at the hospital the next day (4 June 2009) at 9am. On 4 June 2009 he was advised for emergency surgery at the hospital but he was undecided and not keen for the surgery to be carried out in the hospital. The plaintiff sought a second opinion at Miri City Medical Centre two days later ie on 6 June 2009. He was advised by the Medical Centre to be admitted to Miri Hospital for the surgery. The plaintiff was admitted to Miri Hospital on 6 June 2009 at 8.41pm and was operated the next day by Dr Chieng Lee Ling.

[6] Dr Chieng prepared a medical report. He testified that the plaintiff sustained a serious injury to the right eye resulting in the loss of the right eye lens, globe perforation and vitreous hemorrhage. Repair of the globe was done and secondary intraocular lens implant was carried out on 19 April 2010. Dr Chieng testified that there was a small corneal scarring near the visual axis causing slight reduction in contrast and visual acuity in right eye. He said the plaintiff had recovered and obtained a reasonably good visual acuity in the right eye after multiple repairs.

[7] It was not in dispute that the plaintiff had injured his right eye. However, the defendants denied that the injury was due to an accident. The defendants contended that the injury was not an accident within the meaning of the respective insurance policy and put the plaintiff to strict proof. The defendant also contended that the injury was due to the plaintiffs action in willfully and or intentionally inflicting or exposing himself to danger or in engaging in a dangerous activity by climbing the tree in a negligent manner while holding a pair of pruning scissors without using any safety equipment: see exclusion 1 and exclusion 15 of AXA policy.

[8] When the defendants put the plaintiff to strict proof, the onus remained with the plaintiff throughout. The plaintiff must establish on a balance of probabilities that his injury or loss was due to a risk insured by the policy: see eg section 2 — permanent disablement in AXA policy. The plaintiff had testified that on that day he was trimming his bonsai plants in his garden. Then he decided to have a look at the renovation to the back retaining wall in his garden and he climbed a rambutan tree to get a better view. The plaintiff said that he accidentally slipped and fell from the tree and injured his right eye with the pruning scissors which he was then holding in his hand.

[9] The defendants submitted that the medical reports did not describe any injury to the plaintiffs face or body except the injury to his right eye. It was submitted that if the plaintiff had fallen from the tree, he would have suffered some injuries to his face or body, such as bruises and or lacerations especially to his face. It was submitted that therefore the injury to his right eye was deliberate and intentional. The defendants submitted that from his cross-examination and demenour the plaintiff was an unreliable witness and lacked credibility.

[10] During cross-examination it was suggested to the plaintiff that he had financial problems. It was suggested to him that he had bought the two insurance policies and deliberately injured his eye in order to claim the two sums under the insurance. The plaintiff denied the allegations. He testified that he was doing well as an insurance agency manager with Zurich Insurance Malaysia Bhd, formerly known as MAA Insurance. There was no evidence that the plaintiff was under financial constraints at the material times and there was

no evidence that he had deliberately injured his eye in order to fraudulently make the claim under the insurance policies. The defendants did not plead any fraud or fraudulent claims by the plaintiff in the respective defence.

[11] Dr Chieng was asked and he explained that the plaintiff was referred to him to treat the eye injury. He only examined the plaintiff three days after the plaintiff had suffered the eye injury. When he examined the injury to the right eye of the plaintiff he did not pay any attention to any injury, if any, to the face or body of the plaintiff. He was not sure whether the plaintiff sustained any other injury.

[12] From the evidence before the court, although it might be foolhardy for the plaintiff to climb the *rambutan* tree while holding the scissors, it could not be classified or deemed to be a reckless or dangerous activity such as winter sports, rock climbing, mountaineering, parachuting or big game hunting within the meaning of the exclusion 15 clause in the insurance policy.

[13] I agree with Dr Chieng that no one who is sane would deliberately pierce his own eye with the pruning scissors. On the evidence before the court, the injury suffered by the plaintiff was due to an accident which was an insured risk under the respective policy. There was no evidence that he intentionally pricked or pierced his right eye with the scissors. If he did, there was no necessity for him to climb the tree in order to do so.

[14] The defendants submitted that the gardening scissors which were shown to a loss adjuster (DW5) were all rusty and would infect when introduced into the lacerated cornea. It was contended that the plaintiff had exposed himself to a risk of injury due to the rusty pruning scissors. The facts showed that the plaintiff accidentally fell from the tree and injured his right eye with the pruning scissors which he was holding in his hand. The rusty scissors might cause an infection to the eye, it was not the cause of the injury to the eye.

[15] On the facts and circumstances of these two cases, the plaintiff did not intentionally inflict a self-injury nor was he engaging in an unlawful act or in a dangerous or reckless activity. His claims for compensation were not excluded under the respective insurance policy, in particular his claim was not caught by exclusion 1 and exclusion 15 of the policy in the AXA suit.

[16] The next issue is whether the policy was null or voidable for non-disclosure or misrepresentation of material facts. The defendants submitted that the insurance contracts were based on good faith. The statements or answers made in the proposal forms were made the basis of the policy. The defendants contended that the plaintiff failed to disclose material facts to the defendants which were or ought to have been known to the plaintiff but were not or presumed to be known to the defendants. It was submitted that in view of the failure of the plaintiff to disclose such material facts, ie the full insurance policies which he had, the defendants had the right to lawfully repudiate all liabilities under the respective policy. The defendants contended that the plaintiff was in breach of contract and or s 150(1) of the Insurance Act 1996.

[17] Section 150(1) of the Act provides that before a contract of insurance is entered into, a proposer shall disclose to the licensed insurer a matter that (a) he knows to be relevant to the decision of the licensed insurer on whether to accept the risk or not and the rates and terms to be applied; or (b) a reasonable person in the circumstances could be expected to know to be relevant. Section 150(1) reflects the position under common law on the duty to disclose material facts.

[18] Under the common law, insurance is a contract of uberrimae fidei ie utmost good faith. An insured is under a duty to disclose material facts. Any misrepresentation or non-disclosure of material facts by the insured will entitle the insurance company to avoid the contract. A fact is material if it would influence the judgment of a prudent or reasonable insurer in fixing the premium or determining the risk: *Goh Chooi Leong v Public Life Assurance Co Ltd* [1964] 1 MLJ 5, *National Insurance Co Ltd v S Joseph* [1973] 2 MLJ 195.

[19] What constitutes a material fact required to be disclosed? It has been held that the insured has to disclose all facts within his knowledge which would affect the mind of a prudent and experienced underwriter in determining whether he will take the risk and, if so, at what premium and on what conditions. The test is what a reasonable man, in the shoes of the insured, would have considered material: *Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd* [1992] 1 CLJ 330.

[20] In the AXA policy, in answer to question 4 under Part III. General information of the proposal form as follows:

> 4 Are you presently covered by any personal accident insurance? If 'Yes', please state the amount and the name of the insurance company. The plaintiff answered: 'Tahan — 120,000 — MAA — 500K'.

In the Pacific policy, the plaintiff answered:

AXA — 1,000,000

MAA — 600,000

Tahan — 120,000

MAA Takaful — 500,000

[21] The defendants contended that the answers in both proposal forms were false as the plaintiff at the material time was insured with MAA for the total coverage of RM1,250,000. It was submitted that the plaintiff at the material time also had a personal accident insurance of RM10,000 with Jerneh Insurance Bhd which was not disclosed to the defendants.

[22] It was put to the plaintiff that he omitted to inform the defendants that he had an existing life insurance with Jerneh Insurance for RM10,000. The plaintiff answered that he was not aware of this coverage as it was a free group insurance cover by Amway because his wife was an Amway member. It was submitted that the plaintiffs answer was not truthful.

[23] Section 150(2) of the Act provides that the duty of disclosure does not require the disclosure of a matter that (a) diminishes the risk to the licensed insurer; (b) is of common knowledge; (c) the licensed insurer knows or in the ordinary course of his business ought to know; or (d) in respect of which the licensed insurer has waived any requirement of disclosure.

[24] In *Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd*, the insured failed to disclose that he had released a third party from the obligations to repair the insured property. The court decided that the fact was material and ought to have been disclosed. In *Goh Chooi Leong v Public Life Assurance Co Ltd*, the insured did not disclose that he had been treated for pulmonary tuberculosis not long before the date of the declaration. He instead answered 'No' and it was held that it was a deliberate lie. In *National Insurance Co Ltd v S Joseph*, the insured did not disclosure that he had a policy of insurance which had been cancelled nor did he disclose that he had a motor accident. The above cases illustrated that the non-disclosure of material facts would affect or diminish or increase the risks to a licensed insurer.

[25] The defendants did not plead that the failure to disclose all the insurance policies, which the plaintiff had, would affect or diminish the risk or the premium or the terms or conditions of the two policies under AXA and or Pacific. None of the defendants' witnesses had testified as such. There was no evidence that the non-disclosure of the several insurance policies which the plaintiff had bought or were insured would in any way affect or diminish the

risk or the premium or the term or conditions of the two policies issued to the plaintiff: see *Abu Bakar v Oriental Fire & General Insurance Co Ltd* [1974] 1 MLJ 149.

[26] Further, s 150(3) of the Act provides that where a proposer fails to answer or gives an incomplete or irrelevant answer to a question contained in the proposal form or asked by the licensed insurer and the matter was not pursued further by the licensed insurer, compliance with the duty of disclosure in respect of the matter shall be deemed to have been waived by the licensed insurer.

[27] In respect of the AXA insurance, the proposal form was dated 11 June 2008 and the insurance policy was issued on 17 June 2008. Similarly, in respect of the Pacific insurance, the proposal form was dated 12 May 2009 and the insurance policy was issued effective 12 May 2009. The defendants did ask or seek clarification to the answers given by the plaintiff in the proposal forms. The defendants did not send any such letter to the plaintiff. The defendants did not pursue the matters further before the insurance policies were issued to the plaintiff. Section 150(3) deemed that the compliance with the duty of disclosure have been waived by the defendants.

[28] The Insurance Act 1996 has repealed the Life Insurance Companies Act 1962 and the Insurance Act 1963. The preamble provides that this is an Act to provide new laws for the licensing and regulation of insurance business, insurance broking business and adjusting business and for other related purposes. The provisions of sub-ss (2) and (3) of s 150 of the Act have amended or modified the common law requirements of strict compliance of a duty of disclosure of material facts. The two subsections are intended to protect the interests of an insured or a consumer in respect of insurance matters.

[29] The defendants did not plead and did not lead any evidence that the plaintiff had deliberately suppressed a material fact. There was no evidence that the plaintiff had deliberately suppressed a material fact and that it was fraudulently made or omitted by the plaintiff. There were no merits in the submissions of the defendants in these two cases.

[30] Based on the insurance policies, the plaintiff was entitled to be indemnified to the sum of RM500,000 under the AXA policy. The plaintiff was also entitled to be indemnified to the sum of RM250,000 under the Pacific policy. Judgment is therefore entered for the plaintiff for the sum of RM500,000 in Suit MYY-22–40/11 of 2011 and judgment is entered for the plaintiff for the sum of RM250,000 in Suit MYY-22–41/11 of 2011 with costs of RM10,000 against each defendant.

[31] Lastly, the defendants submitted that it was a condition precedent to any liability to the defendants or any rights of action against the defendants under the policies to refer differences arising out of the policies to arbitration.

[32] By applications dated 8 January 2012, the defendants applied that all proceedings in both actions to be stayed to enable the defendants to refer the matter to arbitration pursuant to s 10 of the Arbitration Act 2005. The ground of the application was that there is an arbitration clause in the insurance policy between the plaintiff and the defendants. The plaintiff opposed the applications on the grounds that the defendant had delayed in making the applications and that the defendant had taken steps in the proceedings before making the applications for stay.

[33] In both suits the defendant had filed an appearance to the writ. It has been held that the entry of an appearance does not and cannot amount to a step in a proceeding to deprive a defendant of recourse to refer the dispute to arbitration: *IJM Construction Sdn Bhd v Cleveland Development Sdn Bhd* [2002] 3 MLJ 516; [2002] 8 CLJ 484, *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 5 MLJ 625; [2002] 3 CLJ 213.

[34] In both suits, after the defendant had filed an appearance to the writ, the defendants had asked the plaintiff for an extension of time to file its defence. Instead of filing the defence, the defendants had filed the applications for stay. The question was whether this amounted to a step in the proceedings so that the defendant was no longer entitled to make the applications. It has been held in *Ford's Hotel Co Ltd v Bartlett* [1896] AC 1 that an application for an extension of time for the delivery of a defence is a step in the proceedings. This decision was referred to in *Sanwell Corporation v Trans Resources Corporation Sdn Bhd*. The Federal Court said that what the defendant did was clearly a step in the proceedings by requesting for an extension of time to file the defence, clearly indicating an intention to deliver a statement of defence thus abandoning the right to arbitration. The Federal Court's decision was followed in the case of *Winsin Enterprise Sdn Bhd vs Oxford Talent (M) Sdn Bhd* [2009] MLJU 286; [2010] 3 CLJ 634.

[35] For the reasons given above, the defendant had taken a step in the proceedings before applying for a stay under s 10 of the Act as amended. On 24 April 2012 the court dismissed the applications for stay with costs. There

was no appeal against the decisions of the court. It is too late for the defendants to again raise this issue of referring the suits to arbitration. There are no merits in this ground.

Order accordingly.

Reported by Afiq Mohamad Noor